

STATE OF DELAWARE

THE COURTS OF THE JUSTICES OF THE PEACE 820 NORTH FRENCH STREET, 11TH FLOOR WILMINGTON, DELAWARE 19801

NORMAN A. BARRON CHIEF MAGISTRATE

TELEFHONE: (302) 571-2485

LEGAL MEMORANDUM 80-13

TO:

ALL JUSTICES OF THE PEACE

STATE OF DELAWARE

FROM:

NORMAN A. BARRON

CHIEF MAGISTRATE

DATE: AUGUST 7, 1980

RE:

A FOREIGN CORPORATION'S RIGHT TO SUE IN DELAWARE

A question came up recently regarding a foreign corporation's right to sue in the Courts of Delaware when said corporation had not complied with the provisions of 8 Del.C., §371, which read, in part, as follows:

- "(a) As used in this chapter, the words 'foreign corporation' mean a corporation organized under the laws of any jurisdiction other than this State.
- (b) No foreign corporation shall do any business in this State, through or by branch offices, agents or representatives located in this State, until it shall have paid to the Secretary of State of this State for the use of this State, \$50, and shall have filed in the office of the Secretary of State:
- (1) A certificate issued by an authorized officer of the jurisdiction of its incorporation evidencing its corporate existence . . .;
- (2) A statement executed by an authorized officer of each corporation setting forth (i) the name and address of its registered agent in this State, which agent shall be either an individual resident in this State when appointed or another corporation authorized to transact business in this State, (ii) a statement, as of a date not earlier than 6 months prior to the filing date, of the assets and

liabilities of the corporation, and (iii) the business it proposes to do in this State, and a statement that it is authorized to do that business in the jurisdiction of its incorporation . . "

The penalty for failure to comply with the provisions of 8 <u>Del.C.</u>, §371 is found in 8 <u>Del.C.</u>, §383, which provides, in part, as follows:

"(a) A foreign corporation which is required to comply with §§371 and 372 of this title and which has done business in this State without authority shall not maintain any action or special proceeding in this State unless and until such corporation has been authorized to do business in this State and has paid to the State all fees, penalties and franchise taxes for the years or parts thereof during which it did business in this State without authority. This prohibition shall not apply to any successor in interest of such foreign corporation."

In the case of <u>Farmers Bank v. Sinwellan Corp.</u>, Del.Supr., 367 A.2d 180 (1976), our Supreme Court held that:

"(N)on-compliance with §371 bars a foreign corporation from maintaining 'any action' in the Courts of this State. That is the penalty."

The Court went on to hold that the test for applicability of §371 is whether the foreign corporation does "any" business in this State. In the Farmers Bank case, supra, the foreign corporation maintained a Delaware bank account in its corporate name, advertised in two Delaware newspapers of general circulation, stored its financial records in this State, executed contracts in Delaware with Delaware residents, engaged in credit transactions with Delaware residents and provided taxi service in Delaware. The Court concluded that:

"in the aggregate, at least, Sinwellan's activities in this State clearly go beyond the minimum requirements of the "any" business criterion in §371."

There are exceptions to the qualification requirements of §371. These exceptions are listed in 8 Del.C., §373, and are basically as follows:

- 1. Corporations exclusively engaged in a mail order or similar business, with the orders being accepted outside the state and filled with goods from outside the state;
- 2. Corporations which have agents or salesmen soliciting business within the state, if the orders are subject to approval at offices outside the
 state and the orders are filled with goods from without the state;
- 3. Corporations making contracts outside the state for delivery or construction within the state of machinery, plants or equipment, if the erection or installation requires supervision of technical engineers or skilled employees performing services not generally available and the corporation agrees to perform only those special services;
- 4. Corporations which do business not covered by the preceding exceptions but whose business is nonetheless wholly interstate;
 - 5. Insurance companies doing business in Delaware;
- 6. Corporations which create, as borrower or lender, or acquire evidences of debt, mortgages or liens on real or personal property; and
- 7. Corporations which secure or collect debts or corporations which enforce any property rights securing the same.

See: Folk, The Delaware General Corporation Law pp. 535, 536.

Suppose a foreign corporation brings a complaint against a Delaware citizen for a debt of \$1,000.00. If the individual defendant is represented by an attorney, the attorney may well move to dismiss the case if he has evidence that the foreign corporation has not complied with the provisions of 8 <u>Del.C.</u>, §371. Before you dismiss the case, you should determine whether the foreign corporation falls within one of the exception provisions of 8 <u>Del.C.</u>, §373. If not, then you may dismiss the case 1. In order to take advantage of

The dismissal should be without prejudice. Once the foreign corporation fulfills the requirements of 8 Del.C., § 371, then said corporation may reinstitute the action.

noncompliance, a person sued must raise the deficiency in the pleadings. G.R. Sponaugle & Sons v. McKnight Constr. Co., Del.Super., 304 A.2d 339 (1973).

NAB: pm

The Honorable Daniel L. Herrmann The Honorable William Marvel The Honorable Albert J. Stiftel The Honorable Robert H. Wahl The Honorable Robert D. Thompson The Honorable Alfred Fraczkowski The Honorable Richard S. Gebelein The Honorable Lawrence M. Sullivan The Honorable William J. O'Rourke The Honorable Richard McMahon, State Prosecutor Harold Schimittinger, Esquire, Pres., Delaware State Bar Assoc. Vance A. Funk, III, Esquire, Chief Alderman Nicholas M. Valiante, Director, NCC Dept. of Public Safety John R. Fisher, Director, Administrative Office of the Courts Law Libraries: New Castle, Kent and Sussex Counties Files



STATE OF DELAWARE THE COURTS OF THE JUSTICES OF THE PEACE 820 NORTH FRENCH STREET, 11TH FLOOR WILMINGTON, DELAWARE 19801

TELEPHONE: (302) 571-2485

LEGAL MEMORANDUM 80-13 (ADDENDUM)

TO:

NORMAN A BARRON

CHEF MAS STRATE

ALL JUSTICES OF TE PEACE

STATE OF DELAWARE

FROM:

NORMAN A. BARR

CHIEF MAGISTRATE

DATE: AUGUST 20, 1981

RE:

A FOREIGN CORPORATION'S RIGHT TO SUE IN DELAWARE

Many of the principles discussed in Legal Memorandum 80-13, dated August 7, 1980, were raised in the recent cases of Kidd v. Cuddeback Trane Service, Inc., Del.Super., 79L-JA-11 (unreported letter opinion by J. Christie dated May 6, 1981) and Capitol Products Corporation v: Vari; Del Super , 800-FE-98 (unreported and the letter opinions by J. Taylor dated March 20, 1981 and August 4, 1981). Copies of these opinions are attached hereto. Please review the opinions and attach this package to Legal Memorandum 80-13 as an addendum thereto.

NAB:pn

Attachments (3)

The Honorable Daniel L. Herrmann The Honorable William Marvel The Honorable Albert J. Stiftel

cc: The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Richard Gebelein
The Honorable Lawrence Sullivan
The Honorable William J. O'Rourke
The Honorable Richard J. McMahon, State Prosecutor
Bruce M. Stargatt, Esquire, Pres., Delaware State Bar Assoc.
Professor William J. Conner, Delaware Law School
John R. Fisher, Director, Administrative Office of the Courts
Law Libraries: New Castle, Kent and Sussex Counties
Files

SUPERIOR COURT OF THE STATE OF DELAWARE

ANDREW D. CHRISTIE

COURT HOUSE
WILMINGTON, DELAWARE 19801

William D. Fletcher, Jr., Esquire Schmittinger and Rodriguez, P.A. 414 South State Street P. O. Box 427 Dover, DE 19901

Dennis L. Schrader, Esquire Betts & Schrader 15 South Race Street Georgetown, DE 19947

Re: Robert W. Kidd, III, and Janet M. Kidd vs. Cuddeback Trane Service, Inc., a corporation of the State of Maryland, and Chris M. Cuddeback - 79L-JA-11 (Sussex County)

Submitted: April 22, 1981

Decided: May 6, 1981

Gentlemen:

You will remember that after a hearing held before me, without a jury, on February 13, 1981, I ruled that the defendant, Cuddeback Trane Service, Inc., was entitled to a judgment in the amount of \$1,120 on defendant's counterclaim.

The only issue which remained undecided as of the close of the hearing was defendant's capacity (as a foreign corporation, doing business in Delaware, but not registered to do business in Delaware) to bring the counterclaim in view of the provisions of 8 Del.C. §§ 371, 372 and 383.

This action was filed as a mortgage foreclosure proceeding by Robert W. Kidd, III, and Janet M. Kidd, his wife, as plaintiffs, against the defendant, Cuddeback Trane Service, Inc., a corporation of the State of Maryland. The defendant filed an answer in the foreclosure action alleging that the plaintiffs were not entitled to foreclosure because defendant was entitled to credit for certain rentals plaintiff had collected. However, prior to the hearing in this matter, the mortgage foreclosure complaint was dismissed because defendant sold the property, and, in order to clear the title, defendant paid off the mortgage. The dispute as to the rental moneys was not resolved by the sale.

Messrs. Fletcher and Schrader Re: Kidd v. Cuddeback 79L-JA-11 May 6, 1991 Page 2

Cuddeback filed a motion to amend its pleadings during the week preceding the hearing date and asserted, for the first time, a monetary claim against the plaintiffs in the amount of \$1,120. Upon receiving the amendment seeking an in personam judgment against the plaintiffs by the defendant corporation, the plaintiffs filed an amended answer to the counterclaim by moving to dismiss the action by the defendant corporation on the basis that, as a foreign corporation, defendant lacks the capacity to assert an in personam claim in Delaware due to its failure to comply with 8 Del.C. §§ 371 and 383.

At the hearing, the evidence established that Cuddeback Trane Service, Inc., is a foreign corporation incorporated in the State of Maryland. Its principal business involves the installation of air conditioning and other equipment in buildings located in the State of Maryland. The corporation is not registered to do business in the State of Delaware.

The evidence also established that the defendant corporation had owned the mortgaged property in the State of Delaware for corporate purposes: (1) a vacation residence for corporate officials and (2) for income obtained from renting the vacation residence to other persons. The corporation had maintained separate files on this property, contracted with a Delaware real estate agency to act on its behalf in acquiring tenants for the property and authorized the agency to enter into lease agreements with tenants. It had contracted with approximately 9 leaseholders per year. This business activity produced income from this property in the amount of approximately \$6,300 per year.

It appears, then, that the defendant corporation was doing business in the State of Delaware within the meaning of 8 Del.C. § 371, see, Farmers Bank v. Sinwellan Corporation, Del.Supr., 367 A.2d 180 (1976). The corporation failed to qualify to do business in Delaware as required by § 371. Thus, under the provisions of 8 Del.C. § 383, the corporation is not permitted to "maintain any action or special proceeding in this state . . . "

Defendant seeks to avoid the provisions of 8 Del.C. § 383 by arguing that the Kidds' challenge as to defendant's eligibility to bring suit comes too late in the proceedings and that plaintiffs have, in effect, waived their right to raise the issue. I find this argument to be without merit in view of the fact that the pleadings were amended by the corporation so as to assert this claim for affirmative relief just before the hearing was held. Before the amendment was filed by the corporation, the matter of credit for rent monewas a passive assertion by a defendant for credit toward mortgage paments, and defendant's status to raise such defense did not subject

Messrs. Fletcher and Schrader

Re: Kidd v. Cuddeback

79L-JA-11

m May 6, 1981

Page 3

the corporation to the challenge now before the Court. In short, I rule that the challenge as to the status of the corporation was not untimely since it was filed as soon as the corporation sought affirmative relief. See generally, 5 Wright & Miller, Federal Practice and Procedure, § 1388.

Defendant also seeks to avoid the requirements of 8 <u>Del.C.</u> § 383 by asserting that the Delaware activities of the corporation as the owner of a cottage in Delaware did not amount to doing business in Delaware within the meaning of the statutes. The case of <u>Covle v. Peoples</u>, Del.Super., 349 A.2d 870 (1975), <u>aff'd Del. Supr.</u>, 372 A.2d 539 (1977) is cited.

I do not find this argument to be persuasive. The <u>Coyle</u> case involved a single real estate transaction. This case involves continuing ownership of a property over a period of years with a number of leases negotiated each year. This business investment provided a recreational facility for corporate officials; it also provided corporate income. The property was a corporate asset actively managed for corporate profit within the State of Delaware.

The motion to dismiss the counterclaim under 8 Del.C. § 383 is granted. IT IS SO ORDERED.

Very truly yours,

andun D. Christie

Andrew D. Christie

ADC/emr

Original: Prothonotary

SUPERIOR COURT OF THE STATE OF DELAWARE

CLARENCE W. TAYLOR

COURT HOUSE

March 20, 1981

Stephen R. Spiller, Esq. Charles Snyderman, Esq. Levin, Spiller & Goldlust 913 Market Tower P.O. Box 2094 Wilmington, Delaware 19899

LETTER OPINION AND ORDER

Paul H. Spiller, Esq. Kimmel & Spiller Fourth Floor, Market Tower 901 Market Street Wilmington, Delaware 19801

> Re: Capitol Products Corporation v. Vari Construction Co., Inc. 80C-FE-98

Submitted: January 5, 1981

Decided: March 20, 1981

On Motion of Defendant For Summary Judgment

Gentlemen:

Plaintiff, a Pennsylvania corporation which has not registered to do business in Delaware, sues to recover for goods delivered to plaintiff in Delaware. Defendant has moved for summary judgment on the ground that plaintiff is barred from suing in Delaware because plaintiff has done business in Delaware without having registered in compliance with 8 Del. C. §371(b).

8 Del. C. §383 provides that a foreign corporation which is required to comply with §§371 and 372 of Title 8 and which has done business in Delaware without authority shall not maintain any action in this State unless and until such corporation has been authorized to do business in this State and has paid the requisite fees. The issue here is whether plaintiff has done "any business in this State". Cf. Farmers Bank v. Sinwellan Corporation, Del. Supr., 367 A. 2d 180 (1976). In answer to an interrogatory directed

2 - Capitol Products Corporation v. Vari Construction Co., Inc. 80C-FE-98

by defendant which requested plaintiff to "state whether you have done business in the State of Delaware from 1978-1980," plaintiff answered in the affirmative and stated that:

the number of transactions and the volume of sales are so large as to make it extremely burdensome to respond completely to this interrogatory. Plaintiff's business in the State of Delaware, for the most part, is with the following firms: Grubb Lumber Company, B.F. Rich Company, Mid-South Building Supply, Reynolds Aluminum Supply, Brosius-Eiliason Co., Delmarva Aluminum, Bell Thermolite Window, Booth Glass Company, Inc.

Defendant apparently relies on this answer to provide the factual support for its motion for summary judgment.

Plaintiff has supplied an affidavit with its answering brief which states:

[t]hat plaintiff sells its products in the State of Delaware and other States throughout the United States[, t]hat plaintiff's customers in Delaware are independent distributors who purchase for the purpose of resale and builders and others who purchase for their own use[, t]hat Boyle Associates, which maintains no offices in the State of Delaware is plaintiff's manufacturer's representative in this State[, t]hat Boyle Associates solicits and receives orders in Delaware on behalf of plaintiff[, t]hat all such orders are subject to approval by plaintiff at its offices outside this State[, t]hat all products applicable to such approved orders are shipped by plaintiff from without this State directly to its Delaware customers[, and t]hat any samples of plaintiff's products which are kept within this State are for display or advertising purposes only, and no sales are made from stock which is kept in this State.

Based upon these facts, plaintiff contends that it is not required to meet the registration requirements of 8 Del. C. §371(b) because its manner of business

3 - Capitol Products Corporation v. Vari Construction Co., Inc. 80C-FE-98

falls within the exception contained in 8 Del.C. §373 which provides:

- (a) No foreign corporation shall be required to comply with the provisions of §§ 371 and 372 of this title, under any of the following conditions:
 - (l) * * *
 - (2) If it employs salesmen, either resident or traveling, to solicit orders in this State, either by display of samples or otherwise (whether or not maintaining sales offices in this State), all orders being subject to approval at the offices of the corporation without this State, and all goods applicable to the orders being shipped in pursuance thereof from without this State to the vendee or to the seller or his agent for delivery to the vendee, and if any samples kept within this State are for display or advertising purposes only, and no sales, repairs, or replacements are made from stock on hand in this State;
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 - (4) If its business operations within this State, although not falling within the terms of paragraphs (1), (2), and (3) of this section or any of them, are nevertheless wholly interstate in character;

§373(a)(2) requires a showing of the following:

- (1) that plaintiff employs salesmen to solicit orders in this State,
- (2) that all orders be subject to approval by plaintiff at its offices outside this State,
- (3) that all goods applicable to the orders be shipped from outside the State to the vendee or to the seller or seller's agent for delivery to the vendee.
- (4) that any samples kept in this State be for display or advertising purposes only, and

4 - Capitol Products Corporation v. Vari Construction Co., Inc. 80C-FE-98

(5) that no sales, repairs or replacements are made from inventory on hand in this State.

The factual record is deficient in that it does not unequivocally indicate that Boyle Associates qualifies as salesmen employed by plaintiff to solicit orders in this State and in that it does not state that the conditions set forth in the affidavit apply to all sales made by or on behalf of the plaintiff in the State of Delaware and are for goods to be delivered to vendees in the State of Delaware by shipment from outside Delaware or delivery by plaintiff or plaintiff's agent.

It is clear that in order for the Court to determine whether the exclusionary provision of §373 applies to the business transacted by plaintiff the Court must be supplied with more facts than have been presented. Cf. Nacci v. Volkswagon of America, Inc., Del. Super., 297 A. 2d 638 (1972); Farrell v. Keene, Del. Super., C.A. 77, 1973 (Memorandum Opinion November 14, 1973, Taylor, J.). Accordingly, the Court is not in a position to determine whether or not the plaintiff is protected under §373 and the Court declines at this stage to decide the motion without having been supplied with more complete facts. Plaintiff shall file additional factual material within 30 days from the date hereof. If plaintiff files such additional factual material, plaintiff shall schedule a conference with the Court concerning any further proceedings preliminary to the Court deciding the motion. IT IS SO ORDER ED.

Very truly yours,

CWT/cse

cc: Prothonotary

Enclosure - copy of Farrell v. Keene Opinion

SUPERIOR COURT OF THE STATE OF DELAWARE

CLARENCE W. TAYLOR

COURT HOUSE
WILMINGTON, DELAWARE

August 4, 1981

Charles Snyderman, Esq. Suite 108 1 Pike Creek Center Wilmington, Delaware 19808

LETTER OPINION AND ORDER

Paul H. Spiller, Esq. Kimmel & Spiller Fourth Floor, Market Tower 901 Market Street Wilmington, Delaware 19801

Re: Capitol Products Corporation v. Vari

Construction Co., Inc.

80C-FE-98

Submitted: June 12, 1981 Decided: August 4, 1981

On Motion Of Defendant For Summary

Judgment - Denied

Gentlemen:

By Letter Opinion dated March 20, 1981, the Court reviewed the applicable statutory law and concluded that insufficient facts had been provided to the Court to enable the Court to determine whether the manner in which plaintiff did business qualified it under 8 Del.C. §373 to avoid the prohibition imposed by 8 Del.C. §383 against instituting suit in this State. Plaintiff has now filed two affidavits which, in the judgment of the Court, established that plaintiff's business satisfies the requirements of 8 Del.C. §373. Defendant has indicated that it has no contradictory evidence. Hence, plaintiff is not barred from maintaining this suit.

2 - Capitol Products v. Vari 80C-FE-98

Accordingly, defendant's motion for summary judgment is denied. IT IS SO ORDERED.

Very truly yours,

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CWI/cse

cc: Prothonotary

Superior Court Law Libraries

Court Administrator (2)

U. S. District Court Law Library Delaware Law School Library Court of Common Pleas Judges

Norman A. Barron, Chief Magistrate